No. 11591

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED GERARD and ROSE GERARD,

Appellants

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE.

Appellees.

REPLY BRIEF

S. J. RIGNEY
Cut Bank, Montana
Attorney for Appellants.

Upon Appeal From The District Court
Of The United States
For The District Of Montana

INDEX

TABLE OF CITATIONS

No. 11591

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED GERARD and ROSE GERARD,

Appellants

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE.

Appellees.

REPLY BRIEF

I.

TO ANSWER BRIEF OF THE UNITED STATES

Appellants submit two questions:

(a) May an Indian Ward excluded from his allotment by having had a Fee Patent forced upon him by The United States, prior to the expiration of the primary trust period, without application therefor, or consent to its issuance, have a right to seek redress by making The United States a party to a suit to quiet the title and, if need be, make The United States a

Party Defendant to accomplish that object. That the policy of issuing **forced fee patents** upon Ward Indians, prevailing from 1917 to about 1920, was erroneous was acknowledged by Congress in the Enactment of Section 352a Title 25 U. S. C. A., 44 Stat. 1247, Feb. 26, 1927 c.215. It is not reasonable to hold that the Appellants be deprived of the right to their day in Court. They are citizens of the United States and are seeking to protect their claim to property, of which they have been deprived wrongfully without any authority of law.

The Brief of The United States does not cite any authorities contrary to those the Appellants cited in their Brief at pages 9-20. The argument of counsel for The United States would deprive the Appellants of redress. The courts have rightly resolved doubts in favor of the Indians. A great many of such cases have been considered by this Court.

Only Ward Indians and their rights under Federal Laws and Treaties are involved herein, and Judge Pray in his Order Dismissing the Complaint on the former trial rightly held that the Court had jurisdiction if The United States was not a necessary party. Gerard v. Mercer et al, 62 F. Supp. 28 (D. Mont. 1945). We believe the Court erred in that case by holding that The United States was an indispensable party. The United States is not actually and in person or by any officer excluding the Appellants from their allotments; it was instrumental only in issuing a fee patent prior to the expiration of the trust period, without

application or consent or a finding of competency. The purchaser of the tax deed was and is charged with notice of the law and purchased at his own risk—all identical with purchaser of Mineral Royalty, reserved to the Tribe by law but not reserved in the fee patent issued by the United States. United States v. Frisbee, 57 F. Supp. 299. The United States in forcing fee patents on the Blackfeet Indians did them as grave an outrage and injury as was inflicted upon the Mission Indians involved in the Arenas case: "Conversion, civilization, neglect, outrage." The Secretary of the Interior insists, in the face of the holding of this Court, in the case of U. S. v. Glacier County, 17 F. Supp. 411, 99 Fed. 2d 733, in upholding the wrongful acts of the Department of Interior in forcing the fee patents on the Blackfeet Indians in 1917-1920. For a general discussion of this subject see Felix S. Cohen's Handbook of Federal Indian Law pp. 226-227 and 258-259.

(b) Does not a Ward Indian have a right to quiet title to lands allotted to him and from which he has been excluded during the Trust Period, as the result of a fee patent forced upon him and a subsequent tax deed; does he not have a right to prosecute an action in his own name and right without making The United States a party to the action, particularly so where the United States has neglected or refused to prosecute on behalf of the Indian Ward. If Sec. 345 of 25 U. S. C. A. does not give such permission

then it should be held to be by necessary implied authority to have his day in Court.

II.

ANSWER BRIEF OF DEFENDANTS FRARYS AND MERCERS

(Hall and Alexander)

This brief relies on lack of jurisdiction in the Federal Court, pp. 3-5. It sets up no diversity of citizenship and cites only Montana Code provisions and three Montana cases; none are in point as we view the facts. The four Federal cases they rely upon which are cited upon pages 4 and 5 of their brief are inapplicable as they do not involve Indians Wards or Federal law pertaining to the Indian questions involved. This brief likewise ignores the Ward Indian feature of the case and the forced fee patents and alleges the Complaint is a **collateral attack** on a **fee patent.**

The case of Chatterton v. Lukin cited by these defendants, is not an authority here because in that case the record shows the fee patent was **applied for.**

The Montana authorities cited by Appellants at page 8 of their brief do not support their contentions as to the Complaint here being a collateral attack for the reason that a collateral attack applies only to a Federal fee patent being **issued** under **authority** of law. In Mouat v. Minn. M. & S. Co. 68 Mont. 253, 217 P. 342, (page 8 of Defendants Brief) the Montana Court at page 260 said:

> "But there is likewise another rule equally well established, and with respect to which the Courts are practically harmonious: That where land is not owned by the United States or has been appropriated to a particular use, or reserved from sale, the land officials are without jurisdiction to dispose of it, and if, **in defiance of law,** a patent issue to it, the same is **ineffectual to pass title** and is **void** from the beginning, and in such case may be assailed in an action at law, and like any **void** judgment may be attacked collaterally." (Italics ours).

This Court has held that the forced fee patents issued to the Blackfeet Indians were and are **void.** United States v. Glacier County cited in Appellants brief.

> "Time does not confirm a void act." Sec. 8768 Revised Codes of Montana, 1935.

Estoppel, Statutes of Limitations or Repose do not run against The United States or an instrumentality thereof. Board of Commissioners of Jackson County Kansas v. United States 100 F. 2d 929. The lapse of twenty-seven years, complained of by these defendants at page 6 of their brief, is of no moment.

Chatterton v. Lukin is not applicable as the Indian made application for a fee patent and that was believed by the Court, but denied by Lukin; The last three cases cited by these defendants at page 8 of their brief do not appear in point as they do not involve Indian Wards or Indian lands or **forced fee patents** prematurely forced on the Indian. The case

of Larkin v. Paugh, cited at page 9 of Defense brief involved heirs of an Indian Ward who had applied for a fee patent, and died before it was issued and delivered. Appellants have found none of the jurisdiction cases cited by these defendants in point as to the question raised by Appellants: "Forced fee patents, taxes levied on land during the period of restriction, a tax deed to the County for delinquent taxes so levied."

Under the head of State Statutes of Limitations these Defendants urge: "appellants are precluded from recovery" and cite Sec. 347, Title 25 U. S. C. A. and 9015 of the Mont. Code for 1935. Neither of these sections apply. Nor are the cases cited at pages 10 to 13 in point as each of those citations involves other and different questions not pertinent to the Ward Indian question alleged in appellants complaint.

The only question before this Court at this time is the right of the Indian Complainants to maintain a suit as against The United States it if is an indispensable party, or as against individual defendants claiming any interest in, or possession of the land. The first case was dismissed because The United States was not a party and was held to be a necessary party; The Appellants then commenced a second action and the defendants seek a dismissal because the United States did not **consent** to the suit against it. Thus they put the maltreated Indian in a dilemma—he is deprived of his property and made an outcast and a mendicant whatever way he moves. We submit such

is not the view of the Federal Courts—today more liberal than ever before. In the case of Ward v. Love County, 253 United States 17, 64 L. Ed. 751, Ward and **sixty-six other Indian plaintiffs** sued to recover taxes paid Love County on their allotted lands and recovered. The United States was not held to be a **necessary** party.

In the case of United States v. Nez Perce County, Idaho, 95 F. 2d. 232, (1938) this Court considered the same question presented here with the exception that it was prosecuted by the United States on behalf of its Indian Wards. This Court said:

> ". . . . . The Allotment Act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it, and he had the right finally to receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself, and the Indian may not be deprived of it by the unwanted issuance to him of a fee patent prior to the end of the trust period. Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941; Ward v. Love County, 253 U. S. 17, 40 S. Ct. 419, 64 L. Ed. 751; United States v. Benewah County, 9 Cir., 290 F. 628; Morrow v. United States, 8 Cir., 243 F. 854; Board of Com'rs of Caddo County v. United States, 10 Cir., 87 F. 2d. 55; United States v. Dewey County D. C., 14 F. 2d. 784; United States v. Comanche County, D. C., 6 F. Supp. 401; United States v. Chehalis County, D. C. 217 F. 281. Treaties with Indians, and acts of Congress relative to their rights in property reserved to them have always been

liberally construed by the courts. The dependent condition of these wards of the government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor. This court in United States v. Benewah County, supra, as early as 1923 declared that the Act of May 8, 1906, should be held to mean that the action of the Secretary of the Interior authorized by it can be had only on the application of the allottee or with his consent. The Act of February 26, 1927, was little more than a statutory recognition of the principle there announced. The fee patent in the present instance was issued during the trust period, or at least during an extension of that period. It follows from what has been said that, if it was issued to Carter without his application or consent, his land remained immune from taxation during the whole of the time from 1921 to 1932, and the lien of the county should be held void. (Pp. 235-236)."

Appellants are satisfied that Estoppel, and the Statute of Limitations are not available against a Ward Indian seeking to protect his statutory right to his allotted lands. We do not believe the authorities cited by these defendants are applicable, or at all in point. Appellants authorities have not been disputed or shown to be untrue.

III.

ANSWER BRIEF OF DEFENDANTS, SHUPE AND McCONAHA

(Donovan and Werner)

The trusteeship relation existing between The

United States and its Indian Wards is not that of the ordinary business trust. It is special and exists by virtue of Treaties with the Blackfeet Indians and imposes a duty upon The United States which it has neglected to enforce in regard the Appellants. The Appellants, by reason of Treaties or Agreements and Statutes cited in their Complaint are an instrumentality of the United States. They are held to be **non sui juris** but have the right to sue and may be sued. The Neglect of the United States to abide by the law and protect their property rights should not be held to divest them of their rights to property allotted to them under the General Allotment Act cited in their Complaint. This Court has repeatedly held that Congress had no power to divest Indians of vested rights. Section 352 and 352a and 352b Title 25 U. S. C. A. are **subsequent Acts** and have no pertinence to the issue set out in the Complaint.

The brief of Shupe and McConaha presents no other new or different matter not already discussed in Appellants brief and the Answer brief of the United States and the Brief of Hall and Alexander previously discussed herein.

IV.

ANSWER BRIEF OF J. L. SHERBURNE AND EULA SHERBURNE

(Murrills and Frisbee)

In the brief of J. L. Sherburne and Eula Sherburne

the same issues are raised as in the other briefs already discussed, viz:

1. Complaint does not state a cause of action.
2. Collateral attack on a fee simple patent.
3. The United States is an indispensable party.

The argument under No. 1 above has been met in Appellants Brief and the Answer Briefs already discussed. Much of the matter in the brief under this head is inapplicable and only material under an Answer and a trial on the merits. The theory of these defendants is based on Sections 349-352, 352a and 352b of Title 25 U. S. C. A. enacted subsequent to the vested rights acquired by these appellants. We cannot agree with counsels' theory of the case of U. S. v. Glacier County at pages 7-10 of their brief. They urged the same theory in another action in the Montana Court and the Montana Court did not agree with their view, and made a careful and able analysis of the forced fee patent and taxation of the same on the Blackfeet Indian Reservation in a case involving taxation of fee patent land and did not agree with the theory of the same counsel. Glacier County et al, v. Frisbee et al 164 P. 2d 171, —Mont—.

2. Counsel urge under this section that the Complaint is an attack on a fee patent issued by the United States—a collateral attack. This argument has already been discussed in considering the previous Answer Briefs and we submit that the authorities they cite are not applicable and that the argument is untenable.

3. **The United States has not consented.** This fea-

ture of the case has been considered in the Briefs of of Appellants and other Defendants and needs no additional consideration under this head.

CONCLUSION

It seems that the Appellants have been the victims of **neglect** and **inaction** on the part of the Interior Department. The decision of this Court in Glacier County v. United States, supra, was correct and should have been followed up promptly by the Department to correct the wrongs inflicted on the Blackfeet fee patentees some twenty-seven years ago. But a policy of inaction and gross neglect has been the fact. Unrevealed commercial interests of non-Blackfeet, post traders very likely, have been permitted to enrich themselves at the expense of these Appellants and other Blackfeet. The United States and these Defendants do not want to be disturbed in the policy of commercialism and profit at the expense of the **long-suffering Blackfeet Indians.** They allege all sorts of old and new **super-technicalities** as to parties and pleadings to dismiss this and other actions. We submit that the Complaint contains sufficient allegations to put them on their defense so that justice may prevail.

We submit that the lower Court erred in dismissing the Complaint on any ground. If the United States may not be sued in this action, at least the action should proceed against all of the other defendants. Otherwise there is no likelihood that this generation

of Blackfeet will ever enjoy justice and the protection the United States promised them by Treaty and Statute since 1855.

Respectfully submitted,

S. J. Rigney,

Attorney for Appellants.